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ORIGINAL

NO. 86-976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LEON CARNAL CAREY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, SECOND APPELLATE DISTRICT

OPPOSITION TO PETITION FOR CERTIORARI

ROBERT S. GERSTEIN
STEINER & GERSTEIN
2566 OVERLAND AVENUE
SUITE 700
LOS ANGELES, CA 90064
(213) 837-4771

Attorneys for Petitioner

Supreme Court, U.S.
FILED

FEB 13 1987

JOSEPH F. SHAW, JR.
CLERK

OPPOSITION TO PETITION FOR CERTIORARI

I

CERTIORARI SHOULD NOT BE GRANTED TO RESOLVE CONFLICT OVER THE APPROPRIATE RESPONSE TO AMBIGUOUS INVOCATIONS, AS THAT ISSUE WAS NOT IN DISPUTE BETWEEN THE PARTIES HERE.

Petitioner contends first that the writ should be granted in order to resolve conflict among jurisdictions as to the appropriate response to ambiguous invocations by a suspect of the right to silence (Petition, pp. 10-22). In the instant case, however, all parties adhered to the California courts' position on this issue: that police officers may ask questions to clarify an ambiguous invocation of the right by a suspect. People v. Turnage (1975) 45 Cal.App.3d 201 (see the opinion below, Petition, Appendix, p. 5).

As the propriety of this approach to ambiguous invocation was not raised by any party below, the record in the instant case would be singularly unhelpful in any effort to compare its merits to those of approaches taken by other jurisdictions.

II

CERTIORARI SHOULD NOT BE GRANTED HERE TO DETERMINE BY WHAT STANDARD OF REVIEW ON APPEAL FINDINGS OF AMBIGUITY SHOULD BE TESTED, AS IT IS CLEAR THAT THE COURT BELOW APPLIED THE ONLY PLAUSIBLE STANDARD: THE STANDARD OF SUBSTANTIAL EVIDENCE.

Petitioner asserts that the California Court of Appeal struck down the trial court's finding of ambiguity in spite of the fact that it was supported by substantial evidence. On the basis of this assertion, Petitioner goes on to conclude that the Court of Appeal must have used some standard of review other than substantial evidence (Petition, p. 26).

This is simply not the case. Petitioner presents no basis for believing that there is any dissent among jurisdictions from the use of the substantial evidence test for this purpose. Nor does Petitioner establish that the Court of Appeal here departed from that standard.

It is, in fact, clear from the opinion below that the Court of Appeal considered the whole record, including all "nuances and the totality of the circumstances surrounding the interview" (Petition, p. 27) and found that there was no substantial evidence to support a finding of ambiguity.

That the Court of Appeal considered all of the evidence can be seen from the fact that the court ordered the tape recordings of the interrogation transmitted to it, and listened to them (Petition, Appendix, p. 10, f.n. 4). The court concluded on the basis of its review of this tape, which established an undisputed factual record, that "the trial court's ruling [finding ambiguity] was erroneous as a matter of law" (Petition, Appendix, pp. 10-11).

It is hard to believe that anyone could come to another conclusion on the basis of this record. In response to a request for a waiver of his right to silence, respondent four times said, "I ain't got nothin' to say", once expanding the phrase to "nothin' at all", and once adding, "nothin', nothin'" (Petition, Appendix, pp. 10-11). As the Court of Appeal asked: "[H]ow many times must a defendant exclaim, 'I ain't got nothin' to say' to invoke his privilege to remain silent? (Petition, Appendix, pp. 10-11)."

Aside from any other consideration, it would simply be ludicrous for the Court to deal with the recurring and difficult questions relating to ambiguous invocations of the right to silence in a case involving such a monumental lack of ambiguity.

III

AS THE ISSUE OF THE APPLICATION OF A GOOD FAITH EXCEPTION TO THE

REQUIREMENTS OF MIRANDA WAS NOT RAISED IN THE COURTS OF CALIFORNIA, AND PARTICULARLY AS CALIFORNIA PROCEDURE PROHIBITS THE RAISING OF THIS ISSUE FOR THE FIRST TIME ON APPEAL, IT CANNOT BE RAISED FOR THE FIRST TIME BEFORE THIS COURT.

In its Petition for Certiorari to this Court, petitioner for the first time argues that a good faith exception to the requirements of Miranda v. Arizona, 384 U.S. 436 (1966) should be fashioned for officers who erroneously find ambiguity in invocations of the right to silence, and that the new-minted exception should be applied here (Petition, pp. 27-33).

There are two insuperable barriers to the presentation of this issue here.

First, this Court has long held that it has no jurisdiction to deal with questions which have not been first presented to the state courts for resolution. Hill v. California (1971) 401 U.S. 797, 805-06. The issue of good faith was never raised below.

Petitioner implies that there was "a judicial finding that an officer acted in good faith" below (Petition, pp.27-28). This is disingenuous. A review of the Reporter's Transcript of the hearing in the trial court reveals that the issue of good faith was neither raised by petitioner nor ruled upon by the trial judge (RT 19-24).

Nor was the issue of good faith raised in the Court of Appeal. Though petitioner states that the Court of Appeal "acknowledged the officer's good faith belief" in its opinion (Petition, p. 27), the assertion is simply untrue. The passage to which petitioner refers is no more than a footnote in which the court commented that "Detective Sharp" was emphatic about his perceived 'clarification' duty (Petition, Appendix, p. 14, f.n. 5)." Whatever else can be said about this clearly ironic remark, with its inverted commas around the word "clarification", it cannot be taken seriously as an acknowledgement of the officer's good faith.

The closest petitioner came to raising the good faith

question was in its Petition for Review to the California Supreme Court. In that petition, petitioner did argue that the interrogating officer's "subjective belief" should have been given some indeterminate amount of weight in deciding whether the invocation was ambiguous (pp.13-16). But this by no means offered the California Supreme Court an opportunity to deal with the momentous question of the creation of a new good faith exception to the Miranda requirements, the question which petitioner now presents to this Court.

Secondly, this Court will not deal with a question which the petitioner has failed to raise below in accordance with adequate state procedure. As this Court has held, state procedural doctrines "are no less applicable when Federal rights are in controversy than when the case turns entirely upon question of local or general law." John v. Paullin (1913) 231 U.S. 583, 585; Wolfe v. State of North Dakota, 364 U.S. 177, 194-95 (1960).

The courts of California have held that where the issue of good faith requires a consideration of the facts, it may not be first raised on appeal: any appellate consideration must be based on a prior factual finding by the trial court. Higgason v. Superior Court, 170 Cal.App.3d 929, 941-42 (1985).

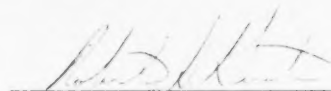
In the instant case, as the trial court determined for itself that the invocation was ambiguous (RT 23-24), there was no reason to examine the officer with regard to his good faith, and no such effort was undertaken. The trial court record is thus devoid of any consideration of the officer's good faith.

As petitioner was precluded from raising this issue in the appellate courts of California under Higgason v. Superior Court, 170 Cal.App.3d 929, 941-42, supra, and made no effort to do so, it is precluded from raising it here.

CONCLUSION

For the reasons stated above, this case is an extraordinarily inapt one to use as the vehicle for consideration

of the weighty issues with which petitioner wishes this court to deal, and the Petition should therefore be denied.

A handwritten signature in dark ink, appearing to read "Robert S. Gerstein", is written over a horizontal line.

ROBERT S. GERSTEIN

NO. 86-976

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LEON CARNAL CAREY,)
)
Petitioner,)
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v.)
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THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
Respondent.)

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the attached motion for Leave to Proceed in Forma Pauperis and Opposition to Petition for Writ of Certiorari by depositing the above in the United States Mail, postage prepaid and properly addressed to:


JOHN VAN DE KAMP
Attorney General's Office
3580 Wilshire Blvd., Rm. 800
Los Angeles, CA 90010

CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION TWO
3580 Wilshire Blvd., Rm. 301
Los Angeles, CA 90010

COUNTY CLERK
Criminal Courts Bldg.
210 W. Temple St., Rm. M-6
Los Angeles, CA 90012

CALIFORNIA SUPREME COURT
3580 Wilshire Blvd., Rm. 213
Los Angeles, CA 90010

Dated this 27 day of October, 1987, at Los Angeles, California.


ROBERT S. GERSTEIN
STEINER & GERSTEIN
2566 Overland Avenue, Ste. 700
Los Angeles, CA 90064
(213) 837-4771